No. 91-502

IN THE
Supreme Court of the United States
OCTOBER TERM, 1991

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

FEDERAL EXPRESS CORPORATION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENT

MARVIN D. MORGENSTEIN *
ELIOT S. JUBELIRER
LEE ANN HUNTINGTON
MORGENSTEIN & JUBELIRER
The Federal Reserve Bank Bldg.
101 Market Street, 6th Floor
San Francisco, CA 94105
(415) 896-0666

JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* *Counsel of Record*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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SUPPLEMENTAL BRIEF OF RESPONDENT

Petitioners' supplemental brief urges this Court not to remand the present case for reconsideration in light of this Court's recent decision in *Morales v. Trans World Airlines, Inc.*, No. 90-1604 (June 1, 1992), which held that state laws regulating airline fare advertising were laws "relating to rates, routes, or services of any [federally certificated] air carrier" within the preemption provision of the Airline Deregulation Act of 1978, 49 U.S.C. App. § 1305(a)(1). Petitioners are correct that the *Morales* decision in no way calls for reconsideration of the Ninth Circuit ruling applying Section 1305(a)(1) in this case. But petitioners are incorrect when they advance a new (though not newly available) argument urging this Court to grant review. The petition should be denied.

1. Petitioners correctly argue that nothing in the *Morales* decision undermines the Ninth Circuit ruling and that a remand for reconsideration in light of *Morales* is accordingly inappropriate here. Supp. Br. 2-3. As petitioners themselves point out, the particular issue in this case is "distinct from that in *Morales*." Supp. Br. 2, 3. The question here is whether surface transportation that is part of the integrated operations of a federally certificated air carrier is covered by Section 1305(a)(1) (*see* Pet. App. A5); the issue in *Morales* was whether state laws regulating the advertising of airline fares were laws "relating to" the rates, routes, or services of the air carrier. The specific *holding* of *Morales*, therefore, would not alter any aspect of the Ninth Circuit's analysis.

But this conclusion hardly suggests, as petitioners would have it, that *Morales* has no relevance here. On the contrary, that case's reasoning and broad interpretation of Section 1305(a)(1) *reinforce* the Ninth Circuit's ruling. *Morales* held, based on the natural meaning of the text, that Section 1305(a)(1) mandates a broad preemption (any laws "relating to" air carriers' rates, routes, or services) to implement the important deregulatory policies behind the provision. So too, in this case, the Ninth Circuit held that state economic regulation of the surface-transportation component of an integrated service offered by a federally certificated air carrier would "relat[e] to the rates, routes, or services of any air carrier [that is federal certificated]," within the plain meaning of Section 1305(a)(1), and would conflict with Congress's deregulation-based policy of fostering the development of air cargo systems. *See* Br. in Opp. 6-9. The Ninth Circuit ruling in this case is thus strongly supported by both the method of analysis and the construction of Section 1305(a)(1) in *Morales*.

2. Petitioners' supplemental brief also attempts to support review in this case by pointing to a Department of Transportation (DOT) report submitted to Congress, pur-

suant to congressional direction, in September 1990—long before the June 1991 Ninth Circuit decision in this case.[1] Based on spliced-together quotes from the report, petitioners assert that DOT, "addressing the precise issue present in this case, has acknowledged that [petitioners'] argument is correct." Supp. Br. 4. But, as the last-ditch nature of this new (but long-available) argument makes clear, this claim even on its face furnishes no ground for granting certiorari in this case and in any event rests on a misreading of the report.

First, even if the report said what petitioners represent—that "preempting state regulation of 'all surface package express . . . [or] surface transportation movements by air carriers' would '*require* legislation' " (Supp. Br. 4, quoting DOT Report at 53-54, 52 (emphasis added by petitioners)—that view would not conflict with the Ninth Circuit's ruling. The Ninth Circuit did *not* hold that "all" surface transportation offered by an air carrier is covered by Section 1305(a)(1). Rather, the case before the court of appeals, and therefore the court's ruling, deals with surface transportation performed in an integrated system offered by an air carrier. Pet. App. 5. Accordingly, even if the DOT report had expressed the legal view that Section 1305(a)(1) does not currently immunize "all" surface transportation by air carriers from state economic regulation, as petitioners assert, that view would not contradict the Ninth Circuit holding.

Second, contrary to petitioners' claim, the DOT report is not in fact a statement by DOT of its statutory interpretation. The report does not purport to set forth any

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[1] In Section 341 of the Department of Transportation and Related Agencies Appropriations Act, 1990, Pub. L. No. 101-164, 103 Stat. 1099 (1989), Congress directed DOT to "study the effect on consumers of State regulation of the rates, routes, and services of the express package industry and make recommendations to Congress." The DOT report is the mandated study.

legal conclusions—much less current views that take account of the Ninth Circuit decision, which post-dates the report. Indeed, the report contains no statutory analysis at all, but discusses only the economic effects of established or attempted state regulation of various aspects of the entire package express industry, which includes bus lines, motor carriers, and freight forwarders, as Congress directed. *See* note 1, *supra*. Thus, the report cannot be read as a statement of DOT's position (allegedly in conflict with the Ninth Circuit ruling) on the proper interpretation of Section 1305(a)(1).

Third, and in any event, nothing in the passages of the DOT report on which petitioners rely, or in any other part of the report, asserts a view of the statute contrary to the Ninth Circuit's. Petitioners rely on two passages. From page 52 of the report they take the "require legislation" quote (Supp. Br. 4) set out above. And they rely on page 53 as a citation for their assertion that "DOT stated that Congress would have to *amend* [Section 1305(a)(1)] to accomplish this objective" [*i.e.*, exempting "all surface transportation" from state economic regulation]. Supp. Br. 4. But petitioners' claim is based on a patent misreading of these passages, which appear in the portion of the report that lists eight "options" for possible congressional action to address the problems with continued state regulation of various aspects of the entire package express industry (not just the air carrier portion). DOT Report at 52-58. *See* Appendix A, *infra* (reprinting this portion of the report).

When the report states, in its introductory paragraph before setting forth the options, that all but two of the options would "require legislation" (Report at 52), it is not asserting that, in DOT's view, the objectives could not be reached without legislation. It is simply stating the obvious, telling Congress that, of the eight options about to be described, six identify potential amendments to legis-

lation.[2] Similarly, when the report identifies the options to "[a]mend" Section 1305(a)(1) in various ways, it is not making any claim that Congress would have to amend the provision to accomplish the goals. It is simply describing what each of these options are—namely, to amend Section 1305(a)(1).

Thus, contrary to petitioners' claim, the relied-on passages of the DOT report do not take the position that Section 1305(a)(1) currently covers only the transportation of packages exclusively by air. Indeed, those passages suggest just the opposite view of the provision. In its statement of the options (Report at 53, 54)—as in DOT's letter of transmittal to Congress (attached to the entire report, lodged with the Clerk of this Court, at p. 2)—DOT pointedly notes that the amendments it is discussing would "clarify" the law (thrown into doubt by the district court ruling in favor of petitioners in this case). The Ninth Circuit ruling in this case, of course, provided just such clarification after the DOT report was submitted to Congress.

3. While the DOT report, therefore, does not indicate any government position on the legal issue contrary to the Ninth Circuit ruling, it does highlight an additional reason why certiorari should be denied. As the report (as well as the legislation that directed DOT to prepare it) makes clear, Congress has under active consideration the entire matter of preemption of state regulation of all surface transportation by trucking companies, air carriers, and others. *See* H.R. 3221, 102d Cong., 1st Sess. (1991) (bill to preempt state regulation of surface transportation provided by *any* "national intermodal carrier," including motor carriers and air carriers), reprinted as

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[2] The introductory paragraph adds that other options, including the remaining two of the eight listed—do nothing, develop a voluntary uniform state code—"would not require legislation." Report at 52.

Appendix B, *infra*. That fact—together with the absence of any lower court conflict and the correctness of the Ninth Circuit ruling, *see* Br. in Opp. 6-14)—makes unnecessary and inappropriate any review by this Court of the present case.

Respectfully submitted,

MARVIN D. MORGENSTEIN *
ELIOT S. JUBELIRER
LEE ANN HUNTINGTON
MORGENSTEIN & JUBELIRER
The Federal Reserve Bank Bldg.
101 Market Street, 6th Floor
San Francisco, CA 94105
(415) 896-0666

JOEL I. KLEIN
KLEIN, FARR, SMITH & TARANTO
2550 M Street, N.W., Suite 350
Washington, D.C. 20037
(202) 775-0184

* *Counsel of Record*

APPENDICES

APPENDIX A

Excerpt from
U.S. Department of Transportation,
Report to Congress: Impact of State Regulation on the Package Express Industry
(Sept. 1990)

VIII. OPTIONS FOR CONGRESSIONAL ACTION

Eight options have been identified for possible action. All eexcept options 1 and 2, require legislation. Other actions which would not require legislation were investigated, but would not assure resolution of the problems addressed above.

Note that as we proceed from Option 3 through Option 8, benefits increase, but so does the scope of change to existing competitive conditions in surface transportation.

OPTION 1: *Do Nothing*

Under this option the states would continue to impose a regulatory burden upon carriers and shippers. Carriers will continue to incur unnecessary costs, which would be passed on to customers in the form of higher than necessary rates and limitations upon service options for shippers.

Pro:

1. Would prevent pressure from state regulatory agencies to keep control of intrastate traffic.
2. Would require no expenditure of federal resources.

Con:

1. Would permit the states to continue to erode the benefits achieved by federal motor carrier and air cargo reform, thus burdening shippers and carriers with higher costs and inefficient operations.

OPTION 2: *Develop A Voluntary Uniform State Code For Regulating Package Express Carriers*

Develop a uniform code for regulation modeled after the federal Motor Carrier Act of 1980, and make a concerted effort to have it adopted voluntarily by the states which exercise economic regulation of trucks and buses.

Pro:

1. Would obviate the need for federal legislation to preempt state regulation of package express carriers.
2. If adopted by all or most of the states and administered as the ICC has administered the MCA, it would permit carriers to conduct surface operations instead of air operations whenever they wished, and maintain their respective uniform national prices and policies.

Con:

1. Based on an attempt by NARUC in the early 1980's to get the states to adopt a uniform model code for state regulation of trucking in general, the chances are slight that all—or even most—states would voluntarily adopt such a code.
2. Even if most states were to adopt the code, there would continue to be differences in the administration of the regulations from state to state, thus diluting the benefits.
3. A great deal of time and effort would have to be devoted to developing the code and getting it ratified by NARUC, then persuading the states to adopt it, and monitoring progress toward uniformity of regulation. A previous effort by a NARUC subcommittee developed a uniform Motor Carrier Code and got it ratified unanimously by NARUC, but not a single state adopted it.

OPTION 3: *Exempt Surface Package Express Movements By Air Carriers*

Amend the Federal Aviation Act of 1958 (Section 1305 (a)(1) of Title 49 United States Code) to clarify that all package express service provided within a single state by "air carriers" would be exempt from state regulation, regardless of whether the movement was performed by air or surface transportation.

Pro:

1. Would address the problem with greater certainty than Option 2.
2. Would allow air carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in services offered to shippers.
3. Would enhance air carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

Con:

1. Exempting only air carriers' surface operations from intrastate motor carrier regulation would place all other types of carriers that provide intrastate express package service at a competitive disadvantage.
2. Some states may object to this exemption, because they have an interest in regulating motor carrier transportation of property that occurs wholly within their boundaries.

OPTION 4: *Exempt All Surface Transportation Movements By Air Carriers*

Amend the Federal Aviation Act of 1958 (Section 1305 (a)(1) of Title 49 United States Code) to clarify that all transportation provided within a single state by "air

carriers" would be exempt from state regulation, regardless of whether the movement was performed by air or surface transportation.

Pro:

1. This amendment has a broader scope than Option 3, and hence would provide broader benefits.
2. Would allow air carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in service offered to shippers.
3. Would enhance carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

Con:

1. Exempting only air carriers' surface operations from intrastate motor carrier regulation would place all other types of carriers that provide intrastate trucking service at a competitive disadvantage.
2. Some states may object to this exemption, because they have an interest in regulating motor carrier transportation of property that occurs wholly within their boundaries.

OPTION 5: *Exempt All Package Express Movements*

Amend the Interstate Commerce Act to provide that package express service would be exempt from state economic regulation so long as it constituted surface transportation performed by an interstate air or motor carrier.

Pro:

1. Provides an evenhanded approach: all competitors, including air carriers, bus, and trucking companies, would benefit.

2. Would allow carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in services offered to shippers.

3. Would enhance carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.

Con:

1. Some states and particularly state regulatory agencies may object to this amendment, because it would infringe upon their right to regulate commerce occurring wholly within their boundaries. Such states are likely to protest that this amendment is effectively a partial deregulation of the motor carrier industry under a different name.

OPTION 6: *Exempt All Motor Carrier Transportation Of Freight*

Amend titles 23 or 49, United States Code, to provide that all transportation of freight would be exempt from state economic regulation so long as it constituted surface transportation performed by an interstate motor carrier.

This change may be accomplished by the enactment of H.R. 4261 (the Hastert bill). The bill would preempt state economic regulation of the intrastate operations of interstate motor carriers and brokers. In addition, it would provide for greater uniformity in state truck registration and taxation procedures. While each state would remain able to set its own tax *rates*, the administrative burden on carriers of complying with taxation and vehicle registration requirements would be greatly reduced. It has been estimated that the regulatory and administrative burdens on motor carriers together amount to $4-6 billion per year.

Pro:

1. Provides a relatively even-handed approach: all competitors, with the possible exception of bus companies, would benefit.
2. Avoids definitional disputes over what constitutes "express package transportation."
3. Allows carriers to achieve cost savings, which would exert downward pressure on rates. It would also encourage improvements in services offered to shippers.
4. Would enhance carriers' operating flexibility and their ability to respond promptly to the demands of the marketplace.
5. Would promote competition in the trucking industry as a whole, as well as in the package express industry.

Con:

1. Some states and state regulatory agencies might object to this amendment, because it infringes upon their right to regulate commerce occurring wholly within their boundaries. Such states are likely to protest that this amendment is effectively a partial deregulation of the motor carrier industry under a different name.
2. It is possible that, if not specifically amended, the Hastert bill would not free bus package express movements from state regulation, because they may not be legally construed as "property."

OPTION 7: *Deregulate The Trucking Industry*

Amend Title 49, United States Code, to eliminate all remaining federal economic regulation over transportation of motor freight, and also exempt it from state economic regulation so long as it constituted surface transportation performed by an interstate motor carrier.

This change would be similar to that proposed in the Reagan Administration's 1987 truck deregulation bill.

Pro:

1. Encompasses a broad range of movements of motor carrier transportation of property, including the package express industry.
2. Would result in additional benefits and efficiencies over and above those of Options 3 through 6.
3. Would deregulate the motor carrier industry and promote competition, not only in the package express industry, but in the motor carrier industry as a whole.

Con:

1. Some states might object to this amendment because it infringes upon their right to regulate commerce wholly within their boundaries.
2. Is broader in scope than the specific problem to be addressed.

OPTION 8: *Sunset The ICC*

Amend subtitle IV of title 49, United States Code, to eliminate economic regulation of motor carriers and interstate water carriers, to transfer rail regulation to DOT, and to sunset the ICC.

These changes could be effected by enactment of H.R. 2211. This bill would eliminate all ICC regulation of the following: trucking; intercity buses; household goods freight forwarders; brokers; pipelines (other than water, gas, or oil); interstate water carriers; interstate rail passenger carriers; and ferries. The state preemption provision would eliminate all state economic regulation of the above segments of the transportation industry.

This is the broadest of all the options addressing state economic regulation of freight transportation, including the express package industry.

Pro:

1. Would result in additional benefits over and above those of Options 3 through 7.
2. Would foster competition in the U.S. transportation system to a greater degree than the other options.
3. Would help make the U.S. more competitive in international markets than would the other options.

Con:

1. Much broader in scope than the problem at hand.
2. Similar bills have had little success in prior sessions of Congress. Hence, it may not be the most promising vehicle for removing state economic regulation of the express package industry.
3. It is possible that, if not specifically amended, H.R. 2211 would not free bus package express movements from state regulation, because they may not be legally construed as "property."

IX. RECOMMENDATIONS

Of the eight options considered, four appear to be inadequate and four are worthy of further consideration. Option 1 (do nothing) does not address what we perceive to be a very real problem. Option 2 (model code) would likely not produce uniformity in this century. This approach did not work well in a similar situation involving trucking regulation, and we see no reason why it would work any better this time. Options 3 and 4 deal only with air carriers. These options would be inequitable to other package express carriers, as well as bad economics.

However, we believe that Options 5-8 deserve serious consideration:

- Option 5 would prohibit the states from imposing economic regulation on package express traffic within their borders. This approach zeroes in on the problem at hand, without addressing broader, related goals (e.g., economic deregulation of *all* motor carriers).

- Option 6 would prohibit the states from regulating *any* motor carrier traffic within their borders. This approach would create a truly level playing field for motor carriers, as well as producing better economic efficiency than Option 5.

- Option 7 would deregulate trucking at both the federal and state levels. This would be very helpful to the efficiency of the U.S. trucking industry, would provide broader benefits to shippers, and would help U.S. industry deal with the issue of international competitiveness. This will be even more important, after the deregulatory reforms of the European Economic Community are put in place in 1992. However, such legislation would be much broader in scope than the minimum "quick fix" needed to address the problem faced by package express carriers.

- Option 8 would sunset the Interstate Commerce Commission and transfer rail regulation to the Department of Transportation. We believe that this legislation would provide very valuable benefits in terms of economic efficiency and international competitiveness. It should be enacted on its own merits. However, its scope far exceeds what is needed to address the problems of package express carriers.

Options 5 through 8 are of sufficiently broad scope to address the problems noted in this study. The Administration has previously submitted legislation that would implement Option 7 and Option 8, as well as providing other

benefits. We believe that these legislative proposals should be enacted on their merits. However, if the Congress prefers a more narrowly focused approach, we believe that Option 5 (prohibit the states from regulating package express traffic within their borders) and Option 6 (prohibit the states from regulating all trucking within their borders) provide the minimum scope of legislative change necessary to solve the problems.

APPENDIX B

102D CONGRESS
1ST SESSION

H.R. 3221

To preempt State laws relating to the regulation of rates for surface transportation of property services provided by certain motor and air carriers

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IN THE HOUSE OF REPRESENTATIVES

AUGUST 2, 1991

Mr. CLEMENT (for himself and Mr. UPTON) introduced the following bill; which was referred to the Committee on Public Works and Transportation

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A BILL

To preempt State laws relating to the regulation of rates for surface transportation of property services provided by certain motor and air carriers.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. SHORT TITLE.

This Act may be cited as the "Intermodal Carriers Competitiveness Act of 1991"

SEC. 2. FINDINGS.

Congress finds that—

(1) computers and telecommunications have made possible an international economy that demands more sophisticated transportation of goods and information;

(2) businesses need rapid transmission of information, dependable delivery of goods, and a wide variety of transportation options;

(3) the express package industry uniquely meets the logistic needs of customers ranging from large multinational corporations to small domestic mail order firms and has provided enormous economic benefit to United States shippers and consumers; and

(4) State economic regulation of the express package industry costs the United States economy an estimated $6,000,000,000 to $8,000,000,000 annually.

SEC. 3. STATE REQUIREMENTS FOR INTERSTATE INTERMODAL CARRIERS.

No State or political subdivision thereof, and no interstate agency of 2 or more States, shall adopt or enforce any law, rule, regulation, standard, or other provision having the force or effect of law relating to interstate or intrastate rates, routes, services, or terms of service of any national intermodal carrier with respect to the provision of surface transportation of property in the State.

SEC. 4. NATIONAL INTERMODAL CARRIER DEFINED.

For purposes of this Act, the term "national intermodal carrier" means—

(1) a motor carrier—

(A) which provides transportation of property in interstate commerce; and

(B) which provides, by itself, or jointly with a company affiliated through common ownership, a national interstate intermodal air-ground transportation service; and

(2) an air carrier which provides transportation described in paragraph (1)(A) and a service described in paragraph (1)(D) of property.